

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS NUMBER: 02-0398**  
**Sales and Use Tax**  
**For the Tax Period 1999-2000**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUES**

**1. Sales and Use Tax- Imposition of Use Tax on Tangible Personal Property**

**Authority:** IC 6-8.1-5-1 (b), IC 6-2.5-3-2 (a), IC 6-2.5-2(c)(1).

The taxpayer protests the assessment of use tax on certain items of tangible personal property.

**2. Sales and Use Tax-Imposition of Use Tax on Delivery Charge**

**Authority:** IC 6-2.5-3-2 (a), IC 6-2.5-4-1(b), IC 6-2.5-4-1(e)(2), 45 IAC 2.2-4-3(b)(3), 45 IAC 2.2-4-3(a).

The taxpayer protests the imposition of tax on a delivery charge.

**3. Sales and Use Tax-Imposition of Use Tax on Painting and Wallpapering Supplies**

**Authority:** IC 6-2.5-3-2(a).

The taxpayer protests the imposition of use tax on painting and wallpapering supplies.

**4. Sales and Use Tax-Imposition of Use Tax on Truck**

**Authority:** IC 6-2.5-3-2 (b), IC 6-2.5-2(c)(1), IC 6-8.1-3-1.

The taxpayer protests the imposition of use tax on a truck.

## **STATEMENT OF FACTS**

The taxpayer is a sole proprietor who does business as a lump-sum contractor. The taxpayer's business installs wallpaper and other wall coverings in hotels and/or motels around the United States. After an audit for the tax period 1999-2000, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional use tax, interest, and penalty. The taxpayer agreed with some of the assessed items and protested the remainder of the assessment. A hearing was held and this Letter of Findings results.

### **1. Sales and Use Tax-Imposition of Use Tax on Tangible Personal Property**

#### **Discussion**

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

Indiana imposes an excise tax, the use tax, on tangible personal property purchased in a retail transaction and stored, used, or consumed in Indiana. IC 6-2.5-3-2 (a). Payment of sales tax at the time of purchase exempts the use of tangible personal property from the use tax. IC 6-2.5-2(c)(1).

The taxpayer protests the imposition of use tax on its use of seeds. The taxpayer submitted an invoice indicating that sales tax had been paid on the purchase of the seeds. Therefore, the use of the seeds is exempt from the use tax.

The taxpayer also protests the imposition of Indiana use tax on a fan. The taxpayer's crew working in Texas purchased the fan in Texas, used the fan in Texas, and paid the Texas sales tax in Texas. Since the fan was not used by the taxpayer in Indiana, it is not subject to the Indiana use tax.

The taxpayer also protests the imposition of Indiana use tax on fifty five (55) Moen rough in kits with a tub, shower, and valve. These kits were purchased by taxpayer's crew working in Chicago, Illinois from a distributor located in Grove Village, Illinois (a suburb of Chicago). They were installed in a motel in Arlington Heights, Illinois (a suburb of Chicago). Illinois sales tax was paid on the kits at the time of purchase. Since the kits were not used in Indiana, they are not subject to the Indiana use tax.

The taxpayer also protests the imposition of Indiana use tax on fabric books listed as reference 0190456. The taxpayer agrees the use of the fabric books was subject to use tax, however, the item is listed twice in the audit. Each transaction can only be subjected to the sales or use tax once. The duplication of the item in the audit was an inadvertent error.

#### **Finding**

The taxpayer's protest to the imposition of use tax on seeds, a fan, rough in kits, and the duplicate fabric book is sustained.

### **2. Sales and Use Tax- Imposition of Use Tax on Delivery Charge**

### **DISCUSSION**

The taxpayer purchased hardwood mulch and paid for delivery of the mulch to its facility. The audit imposed use tax on the delivery charge. The taxpayer protested this assessment.

Retail transactions made in Indiana are subject to sales tax. IC 6-2.5-2-1. A retail transaction is defined generally as the acquiring and subsequent selling of tangible personal property. IC 6-2.5-4-1(b). Except for certain enumerated services, sales of services are generally not retail transactions and are not subject to sales tax. Delivery prior to the transfer of title to the purchaser is, however, one of the enumerated services that is specifically subjected to sales tax. IC 6-2.5-4-1(e)(2). If sales tax is not collected at the time of the original payment, the delivery charge is subject to the complimentary use tax. IC 6-2.5-3-2 (a).

The taxpayer maintains that separately stated delivery charges where no F.O.B. has been established are non taxable. The taxpayer bases this conclusion upon 45 IAC 2.2-4-3(b)(3) which states, “[d]elivery charge[s] separately stated where no F.O. B. has been established [are] non taxable.” The taxpayer’s reliance on F.O.B. designations in this case is misplaced. The Regulation’s reference to F.O.B. designations are applicable only when public transportation companies deliver the product.

There are two prerequisites for separately stated delivery charges to be subject to sales or use tax. The Regulations state these prerequisites as “[s]eparately stated delivery charges are considered part of selling at retail and subject to sales and use tax if the delivery is made by or on behalf of the seller of property not owned by the buyer.” 45 IAC 2.2-4-3(a). In this instance, the first prerequisite for assessing sales tax is met because the retail merchant delivered the mulch.

Whether or not sales or use tax applies to these delivery charges, then, depends upon when title to the goods transferred to the buyer. The Indiana law concerning the passing of title of goods to the buyer states that, “Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. . .” IC 26-1-2-401(2). The taxpayer offered no evidence indicating that title to the goods passed from the retail merchant to the taxpayer at any point prior to delivery of the goods. The taxpayer’s fact situation, then, meets the requirements of 45 IAC 2.2-4-3(a) with the delivery service taking place prior to the transfer of title to the buyer. The delivery charges are subject to Indiana sales and use tax.

### **FINDING**

The taxpayer’s protest is denied.

### **3. Sales and Use Tax-Imposition of Use Tax on Painting and Wallpapering Supplies**

#### **DISCUSSION**

The taxpayer’s protest items 3, 6, and 9 concern the assessment of use tax on painting and wallcovering supplies pursuant to IC 6-2.5-3-2(a). The supplies were purchased from two major

national paint suppliers. Even though the invoices all have the taxpayer's Indiana address as the "ship-to" address, the taxpayer contends that the items were never shipped to Indiana. The taxpayer argues that each of these items was purchased and used in another state where the taxpayer had crews working on hotels and motels.

The taxpayer supplied a letter from one of the vendors stating that in the absence of a job account, the "ship-to" address will be the shop account of sold-to information. The letter also indicated that the invoice indicates the store location where the items were sold. Each of the protested invoices originates in a store outside of Indiana. Each invoice indicates that sales tax was paid to the state where the store was located. The taxpayer indicated that supplies were consistently purchased in stores near the out-of-state work locations where they were used. Since the subject supplies were not used in Indiana, the Indiana use tax does not apply.

### **FINDING**

The taxpayer's protest is sustained.

#### **4. Sales and Use Tax-Imposition of Use Tax on Truck**

### **DISCUSSION**

The taxpayer loaned money to another party to purchase a triaxle dumptruck. After the purchaser defaulted on its repayment of the loan, the taxpayer foreclosed on the lien. The taxpayer took possession of the truck and titled the truck in its name. The Bureau of Motor Vehicles did not collect sales tax from the taxpayer when it retitled the truck. After the repossession, the taxpayers used the truck for business purposes. They added the truck to their depreciation schedule. The taxpayer protests the assessment of use tax on their use of the truck pursuant to IC 6-2.5-3-2(b) as follows:

The use tax is also imposed on the storage, use, or consumption of a vehicle, an aircraft, or a watercraft, if the vehicle, aircraft, or watercraft:

- (1) is acquired in a transaction that is an isolated or occasional sale; and
- (2) is required to be titled, licensed, or registered by this state for use in Indiana.

The taxpayer acquired the truck in an isolated sale. The taxpayer needed to title the truck to drive it on the Indiana highways in the course of its business. The taxpayer did not pay sales tax when it titled the truck. Therefore, there is no exemption from the use tax because sales tax was paid on the sale transaction. IC 6-2.5-2(c)(1). The taxpayer did not establish that its use of the truck qualified for any other exemption. The taxpayer meets the requirements of the statute, thus subjecting the use of the truck to the Indiana use tax.

The taxpayer argues that it does not owe use tax at this time because the Bureau of Motor Vehicles failed to collect sales tax at the time the truck was titled to the taxpayer. The taxpayer

errs in this conclusion. The department is charged with the primary responsibility for collecting use taxes. IC 6-8.1-3-1. If the Bureau of Motor Vehicles mistakenly fails to collect the use tax at the time of issuing a title, the department has the obligation to collect the use tax at a later time. The assessment of use tax pursuant to the audit is an appropriate method for the department to collect the use tax due to the state.

### **FINDING**

The taxpayer's protest is denied.

KMA/JMM/MR--042110